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No. 99-588

In The

Supreme Court of the United States

VICTORIA INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners,

v.

DWIGHT HARRIS and GENE MARTIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Texas Association of School Boards Legal Assistance Fund ("The Fund") and the National School Boards Association ("NSBA") hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for each Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of the Fund in this case arises from the fact that it represents over 750 school districts in Texas who could be adversely affected by the majority opinion of the Fifth Circuit Court of Appeals, which significantly expands the definition of First Amendment speech involving a matter of public concern and denied qualified immunity to Petitioners by finding the Constitutional issues were clearly established despite the notable absence of any authority in existence at the time of Petitioners' allegedly wrongful conduct.

NSBA represents the nation's 95,000 school board members, who govern more than 15,000 local school districts that serve more than 46.5 million public school students - approximately 90 percent of all elementary and secondary school students in the nation. NSBA has had a longstanding interest in the effective development and implementation of local school board policies, including those touching on the First Amendment and free speech.

In the instant case, Petitioners set forth legal arguments supporting the position that Respondents' speech addressed matters of private, not public, concern. The brief which amicus curiae is requesting permission to file

will demonstrate the errors of the Fifth Circuit in deciding this issue and provide a more comprehensive analysis of the importance of this constitutional issue to school districts.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, the Texas Association of School Boards Legal Assistance Fund ("The Fund") and National School Boards Association ("NSBA"), submit this brief urging the Court to reverse the decision of the court below.[1] If upheld, the appellate court's opinion will allow disgruntled school employees carte blanche to undermine their supervisors in the name of free speech over matters not of general public concern.

Nearly 750 public school districts in Texas are members of the Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. The Fund is governed by three organizations: The Texas Association of School Boards (TASB), the Texas Association of School Administrators (TASA), and the Texas Council of School Attorneys (CSA). Because they are concerned about the negative impact of the court of appeals' decision, the Fund has paid all costs associated with the preparation of this brief.

TASB is a non-profit, unincorporated association of public school districts in Texas. Approximately 1,047 school districts, through their elected boards of trustees, have joined TASB.

TASA represents school superintendents and other administrators who are responsible for carrying out the educational policies adopted by their local boards of

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

trustees. CSA is composed of attorneys who represent more than 90% of the public school districts of Texas.

The Fund submits this brief out of concern for more than 7,000 school campuses across the state which manage their employees efficiently and provide education to Texas children.

Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.

NSBA represents the nation's 95,000 school board members, who govern more than 15,000 local school districts that serve more than 46.5 million public school students – approximately 90 percent of all elementary and secondary school students in the nation. NSBA has had a longstanding interest in the effective development and implementation of local school board policies, including those touching on the First Amendment and free speech.

SUMMARY OF ARGUMENT

The Fifth Circuit now treats all teacher complaints as matters of public concern. Complaints of this nature have never before been characterized as such. The court erred in requiring Petitioners to prove actual disruption and in denying qualified immunity to Petitioners.

ARGUMENT

I. The Fifth Circuit improperly broadened the definition of speech involving a matter of public concern.

The Fifth Circuit's decision empowers school employees to criticize a supervisor in the name of free speech and public concern because, in this instance, they are on a committee "involved in attempts to raise the level of education."[2]

The Fifth Circuit has never before held that an employee's criticism of a supervisor constitutes a matter of public concern.[3] Previous Fifth Circuit opinions have expressly refused to extend the protection of the First Amendment to such comments, holding instead that employees' speech is of public concern only in cases involving the report of corruption or wrongdoing to higher authorities.[4]

Here, the Fifth Circuit departed from its own precedent by holding that teachers serving on a school improvement committee were entitled to both voice criticisms of their principal during a committee meeting and to disseminate a memorandum criticizing the principal. The court concluded that this conduct was protected speech because they "faced the choice of either telling the truth and fulfilling their duties as committee members or keeping silent and frustrating their purpose and function

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[2] *Harris v. Victoria Indep. Sch. Dist*, 168 F.3d 216, 222 (5th Cir. 1999).

[3] *See id.* at 225 (Smith, J., dissenting).

[4] *Wallace v. Texas Tech Univ.*, 80 F.3d 1042 (5th Cir. 1996).

on the committee."[5] By failing to consider the content, context, and form, the court would allow employees to speak openly on internal matters not of public concern. Public ridicule of a supervisor to other teachers not involved in the dispute serves only the purpose of disrupting school administration.

A. The Fifth Circuit failed to apply the "citizen versus employee" distinction in analyzing the subject matter of Respondents' speech.

When an employee speaks upon "matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken allegedly in reaction to the employee's behavior."[6] The "citizen versus employee" distinction is designed to allow public employees to participate in public affairs.[7] The history of First Amendment cases and involving public employees began as an attempt to allow public employees to join political organizations without fear of discharge.[8] Although this Court has since extended such protection, the "citizen versus employee" distinction remains.

Respondents' speech occurred at a meeting attended only by district employees and a hired consultant. They

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[5] *Harris*, 168 F.3d at 222.

[6] *Connick v. Myers*, 461 U.S. 138, 147 (1983).

[7] *See id.* at 144.

[8] *See id.*

then put a memorandum in teachers' mailboxes calling the principal a vindictive bully who was unable to make decisions, and demanded her resignation. They had no interest other than as disgruntled employees.

Job satisfaction is not a fundamental right. Because the Fifth Circuit failed to correctly apply the "citizen versus employee" distinction, it improperly found that Respondents were speaking on a matter of public concern.

B. The Fifth Circuit improperly applied the test of content, form, and context in determining the nature of Respondents' speech.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement."[9] Although the Fifth Circuit reiterated the correct test, it defined each element too broadly, resulting in an unworkable standard.

1. Content

The content of Respondents' speech involved internal management issues. The Fifth Circuit has never before held that internal management issues and employee grievances are matters of public concern.[10] Performance and morale at work are matters of private

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[9] *Connick*, 461 U.S. at 147.

[10] *Harris*, 168 F.3d at 225 (Smith, J., dissenting).

concern.[11] For example, a teacher's complaints that her supervisor was difficult to communicate with and was hostile and argumentative are not matters of public concern.[12]

Speech that involves a matter of public concern includes serious complaints about issues that have "societal ramifications," such as racial discrimination;[13] sexual harassment;[14] corruption;[15] and tampering with government documents.[16]

The speech here involved complaints about performance (poor job implementing the improvement plan) and managerial style (bullying and vindictive). Such complaints do not have the same "societal ramifications" as allegations of theft, racial discrimination, and sexual harassment.

2. Form

Citing cases only involving public employees' sworn courtroom testimony, the Fifth Circuit characterized Respondents' speech as a "truth-seeking process." Here, Respondents were not giving sworn testimony in court.

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[11] *See Moore v. Mississippi Valley State Univ.*, 871 F.2d 545 (5th Cir. 1989); *Connick*, 461 U.S. at 148-49.

[12] *See Khuans v. School Dist.*, 123 F.3d 1010 (7th Cir. 1997).

[13] *Givahn v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979).

[14] *Wilson v. U.T. Health Center*, 973 F.2d 1263 (5th Cir. 1992).

[15] *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042 (5th Cir. 1996).

[16] *Benningfield v. City of Houston*, 157 F.3d 369 (5th Cir. 1998).

"[T]he goal of grand jury proceedings, of criminal trials, and of civil trials is to resolve a dispute by gathering the facts and arriving at the truth, a goal sufficiently important to render testimony given in **these contexts** speech of public concern."[17] An internal school committee meeting is not the same. Because schools are not typically public forums, restrictions on speech can be imposed so long as they are "reasonably related to legitimate pedagogical concerns."[18]

If Respondents' speech could be characterized as a matter of public concern simply because they were involved in the "truth seeking process," then the form requirement would be met in every case. Likewise, when a committee meets to discuss any issue, the committee is "seeking the truth." If the only form requirement is whether the speech is made in search of the truth, then every case meets the test.

3. Context

The Fifth Circuit used the backdrop of public debate and the Respondents' "constant involvement in attempts to improve education" to conclude that the context of their speech involved a matter of public concern.[19] The court incorrectly emphasized the public debate element and misconstrued the evidence. Its characterization of the

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[17] *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1568 (5th Cir. 1989) (quotations and citations omitted).

[18] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

[19] *See Harris*, 168 F.3d at 222.

context of the speech as an attempt to improve education was erroneous.

While a backdrop of public debate might indicate that a *citizen* speaking on the debated topic would be protected under the First Amendment, the existence of such a debate has no relevance in determining whether a school *employee* was speaking on a matter of public concern in the workplace. Public debate necessarily occurs outside of the workplace and should not affect whether an employee, while at work, speaks on a matter of public concern. The key issue is the context in which the employee comments and whether those comments, in that specific context, are of public concern.

Other circuits have held that the existence of public debate on a subject has limited relevance in determining whether speech involves a matter of public concern. One Circuit has cautioned that "in assessing whether the speech touches upon a matter of public concern, it is important not to equate the public's curiosity about a matter with a matter having societal ramifications."[20] Similarly, another circuit has excluded the degree of public interest in an employee's speech from the analysis of whether that speech involves a matter of public concern.[21]

The proper stage to consider evidence of public debate is only in balancing the employer's interest in

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[20] *Egger v. Phillips*, 710 F.2d 292, 316-17 (7th Cir. 1983), *overruled on other grounds, Feit v. Ward*, 886 F.2d 848 (7th Cir. 1989).

[21] *See Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986).

efficient operations against the employee's right to freedom of speech.[22] This balancing test occurs only if the employee's speech involves a matter of public concern.[23]

Even if a backdrop of public debate is relevant, no such backdrop was considered by the Fifth Circuit. All of Respondents' speech was made entirely within the school environment. The only connection to any alleged public interest stems from a newspaper article that commented merely on the ratings of the school.[24] There is no evidence that the public was otherwise interested in or aware of Respondents' comments.

The Fifth Circuit majority concludes that Respondents were "constantly involved in attempts to raise the level of education at Victoria High School."[25] Teachers are necessarily involved in (and responsible for) improving education. That is their job. The context of their speech must be more than something job-related to transform it into a matter of public concern. If a teacher's speech is a matter of public concern because the speaker intends to "improve education," then *everything* becomes a public concern.

In *Khuans*, a special education teacher served as "liaison" between other teachers in her department and the administration in communicating concerns about the department. Her comments criticizing the department head, although made in her capacity as "liaison," were still

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[22] *See id.* at 1514.

[23] *Id.*

[24] *Harris*, 168 F.3d at 226 (Smith, J., dissenting).

[25] *Id.* at 222.

complaints about how her supervisor performed her job, not comments of public concern.[26] The same is true here.

Another clue in analyzing the true nature of speech is the person to whom the statements are made.[27] A teacher's memorandum criticizing her principal does not rise to the level of a public call to change.[28] Similarly, Respondents' comments were directed to fellow teachers, not the general public. They spoke up to air their personal gripes about the principal. The fact that they served on a committee does not change the context.

If speech made in a school committee meeting is public concern, then all speech, no matter how disruptive, is protected. Allowing disgruntled teachers such liberties will render it impossible for schools to function, a concern this Court has specifically recognized.[29]

II. The Fifth Circuit erred by requiring the district to show actual disruption.

Once a court has found that a public employee's speech involves a matter of public concern, the court must then consider whether the interests of the employee, as a citizen, outweigh the interest of the state, as an

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[26] *See Khuans*, 123 F.3d at 1017-18.

[27] *Wales v. Board of Educ.*, 120 F.3d 82, 84 (7th Cir. 1997).

[28] *Id.*

[29] *See Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968).

employer, in promoting the efficiency of the public services it performs through its employees.[30] In doing so, the court should consider the following factors:

> (1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.[31]

Although the Fifth Circuit accurately stated the *Pickering* balancing test, it incorrectly applied it, requiring the district to prove actual disruption.

School administrators have legitimate interests in promoting efficiency and integrity, maintaining proper discipline, and ensuring close working relationships among employees.[32] On Rehearing, the majority here concluded that no balancing was required because one side of the scale sat empty and opined that Petitioners "did not effectively allege that [Respondents'] speech

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[30] *See id.* at 568.

[31] *Khuans*, 123 F.3d at 1015.

[32] *See Connick*, 461 U.S. at 151.

disrupted the school environment or affected their work in any way."[33]

No such showing is required. This Court has specifically held that "substantial weight [must be given] to government employers' **reasonable predictions of disruption**, even when the speech involved is on a matter of public concern."[34] The public employer should not be required to wait until actual disruption occurs. Where employee speech carries the potential to be disruptive, the public employer must have the ability to move quickly.[35]

Respondents' conduct, their "Concerns" memorandum, and their demands for removal of their principal gave Dr. Brezina reason to believe that their actions "would disrupt the learning environment, undermine the authority of those responsible for the implementation of the plan, and hinder the close working relationships that were necessary in order for the plan to work."[36] The Fifth Circuit is incorrect that "one side of the scale sat empty," and it was error for the court to decline to balance the interests of the district and those of Respondents. To deprive governmental employers of the protection of the *Pickering* balancing test until they prove harm or "actual disruption" ties the hands of educational institutions until after the damage is done. It is for the districts, not

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[33] *Harris v. Victoria Indep. Sch. Dist.*, No. 97-41015, 1999 U.S. App. LEXIS 18305, at *2 (5th Cir. July 6, 1999).

[34] *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (emphasis added).

[35] *Khuans*, 123 F.3d at 1014.

[36] *Petition for Writ of Cert.* App. at 44-45.

the courts, to exercise such discretion. This Court has recognized that in order to provide meaningful education, administrators must have the "prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch."[37]

III. The Fifth Circuit erred by denying qualified immunity to Petitioners.

Qualified immunity is designed to avoid distractions from governmental duties, inhibition of discretionary action, and deterrence of able people from public service.[38] It shields conduct that does not violate clearly established constitutional or statutory rights of which a reasonable person would have been aware, and the right must be sufficiently clear such that a reasonable official would understand that his conduct violates that right.[39]

Respondents and the Fifth Circuit relied on decisions which were decided after the district transferred Respondents in January, 1996; decisions of which the district could not have been aware.

The fact that both the trial judge and dissenting appellate Justice Smith disagree with the majority obviates that the law was not clearly established.

> "Equivocation by the judges who have examined the situation is the best proof of legal uncertainty, and legal uncertainty confers

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[37] *Connick*, 461 U.S. at 151.

[38] *See Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

[39] *See Anderson v. Creighton*, 483 U.S. 635 (1987).

> immunity. Until the right in question has been 'clearly established,' courts do not demand that public officials dig into their pockets . . . How could anyone say that . . . unlawfulness . . . must have been apparent to . . . a non-lawyer, when with the benefit of hindsight and full reflection, a federal district judge found that [the] . . . acts were *not* unlawful? . . . Government officials must be granted the ability to pass unmolested through bogs of murky legal precedent. They must not become prey to every hypothesis of what the law might have come to forbid had it eventually developed along certain lines. When the law is clear, and an official's duties delineated, then he will not be able to rely on the immunity defense. But we must not and do not demand that every government official become skilled in guessing the future path of the law.[40]

Although the Fifth Circuit recognizes that "*Connick* and *Rankin* exemplify the difficulty of delineating any bright-line constitutional rule that might furnish a test for denying qualified immunity in such actions,"[41] it would require Petitioners to comply with "clearly established" law when the four judges who have already reviewed this case in lower courts cannot agree. The same questions which Justice Breyer recently raised about the meaning of

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[40] *Dahm v. Flynn*, 60 F.3d 253, 259, 261 (7th Cir. 1994) (Easterbrook, J., dissenting).

[41] *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988); *see also Gonzales v. Benavides*, 774 F.2d 1295, 1303 (5th Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) (stating that "individualized balancing seems preferable to a predictable but inflexible categorical approach . . . because of the variety of circumstances in which public employees speak").

"policy or custom" in 42 U.S.C. § 1983 apply to the qualified immunity issue here:

> "The original principle has generated a body of interpretive law that is so complex that the law has become difficult to apply. Factual and legal changes have divorced the law from the distinction's apparent original purposes. And there may be only a handful of individuals or groups that have significantly relied upon perpetuation of the original distinction. If all this is so, later law has made the original distinction, not simply wrong, but obsolete and a potential source of confusion."[42]

CONCLUSION

The Court is urged to review the Fifth Circuit opinion, reverse it and confirm the trial court ruling that Petitioners are entitled to immunity. To do otherwise effectively sends a message to educators to put down their lesson plans and pick up law books in an attempt to predict the meaning of law upon which jurists on the trial and Fifth Circuit courts cannot agree. Teachers' criticisms of their supervisor were not, and are not, clearly protected speech under the First Amendment.

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[42] *Board of the County Commissioners of Bryan County, Okla. v. Brown*, 520 U.S. 397, 431 (1997).

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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